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In the

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware Corporation

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where the government admittedly deprives an owner of the right to exclude third parties from his land, may the government evade liability for a physical taking merely because it did not "cause" or "induce" or "force" the subsequent occupation or exercise "control" over the occupier?

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INTEREST OF AMICUS CURIAE

For three decades, amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Finally, PLF has participated as amicus curiae in nearly every major real property takings case, and numerous other takings cases, heard by this Court in the past two decades.[1]

SUMMARY OF ARGUMENT

Petitioner Boise Cascade alleged—and the court below expressly acknowledged—that Boise lost the right to exclude spotted owls from its property as a result of the government's enforcement of regulations promulgated under the Endangered Species Act (ESA). Nonetheless, the Court of Appeals for the Federal Circuit rejected Boise's physical takings claim on the ground that the government could not be liable for a taking by permanent physical occupation if it did not "cause" or "induce" or "force" the occupation and exercised no "control" over the occupier. In so deciding, the lower court resolved an important question of federal takings law in a way that conflicts with this

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Court's takings jurisprudence and with the decisions of other lower courts.

First, this Court's decisions make clear that the government effects a physical taking whenever it requires a property owner to submit to the physical occupation of his land or (to say the same thing) whenever it deprives the owner of the right to exclude strangers. Under either formulation, it is *required acquiescence* that is the touchstone of a compensable physical occupation. This Court's decisions further make clear that the government cannot evade takings liability merely because the instrument of the required occupation was not the government itself but rather a third party. In none of these decisions did the Court make the government's "causing or inducing" (let alone "forcing") the third-party occupation a prerequisite to liability, nor did the Court require that the government exercise some "control" over the third-party occupier. Indeed, in each of the cases, the government was liable for a physical taking despite having merely "permitted" the occupation, which resulted from the independent choice of a third party.

Second, lower courts have applied this Court's physical takings jurisprudence in a manner that conflicts with the decision below. These courts have found that physical takings are (or would be) effected by two federal regulatory schemes that require property owners to acquiesce in physical occupations by their competitors. Under neither of these schemes could the government be said to "cause or induce" (or "force") the occupations or to "control" the occupiers, and no court made such causation, inducement, or control a prerequisite to the finding of physical taking. Moreover, the courts rejected the argument that a required acquiescence in a physical occupation could be justified as merely a "permissible regulation of the *use* of real property."

ARGUMENT

IN RULING THAT GOVERNMENT DOES NOT EFFECT A PHYSICAL TAKING IN DEPRIVING AN OWNER OF THE RIGHT TO EXCLUDE THIRD PARTIES, THE LOWER COURT DEPARTED FROM THIS COURT'S DECISIONS AND EXACERBATED A CONFLICT AMONG THE LOWER COURTS

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court identified "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." The first instance of what are called "categorical" takings "encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* As to such physical invasions—also called physical "occupations"—the law is that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* As set forth below, Boise Cascade suffered this kind of categorical taking when the government forced it to submit to the physical occupation of its timberland by spotted owls. In determining otherwise, the Federal Circuit court rejected this Court's physical takings jurisprudence and exacerbated a split in the lower courts on an important question of takings law.

A. The Issue and the Lower Court's Ruling

In its most recent consideration of categorical takings by physical occupation, this Court explained that the government effects a physical taking whenever "it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992). To rephrase the point, a physical taking occurs whenever the government deprives a property owner of his "right to exclude," a right that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 528 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). In either

formulation, it is the "element of required acquiescence [that] is at the heart of the concept of occupation." *Id.* at 527 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)). Indeed, the Court recently noted the obvious point that this required acquiescence is often effected by means of *regulation*: where "regulations . . . require the [property owner] to suffer the physical occupation of a portion of his building," they will be analyzed not as regulatory takings but rather as physical takings. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1479 n.18 (2002) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

In the present case, Boise Cascade alleged, among other things, that it "was prevented from excluding spotted owls from its property." 296 F.3d 1339, 1352 (Fed. Cir. 2002). On this point, the lower court essentially agreed with petitioner: "The ESA itself precludes Boise from harassing, harming, pursuing, wounding, or killing spotted owls. Boise lost whatever right it had to 'exclude' the owls nesting on its land when they were listed as a threatened species under the ESA." *Id.* at 1354 (citation omitted and citing 16 U.S.C. §§ 1532(19), 1538(a)(1)).[2] To frame Boise's allegation in the terms used in the foregoing precedents, the ESA, as enforced by the Oregon district court's injunction, deprived petitioner of the right to exclude the owls

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[2] The Federal Circuit apparently found it significant that the ESA itself, as opposed to the district court's injunction, "was responsible for taking [Boise's] right to exclude spotted owls." *Id.* This distinction is irrelevant for present purposes, however. Boise's takings claim is not asserted against the district court, nor even against the statute itself, but rather against the United States Government. The precise division of causative responsibility among the federal statute, the federal regulations, the federal administrative agency, and the federal district court has no bearing on whether there has been "*governmental* interference with property rights . . . amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis added).

from its property and instead required petitioner to acquiesce in the owls' presence on its land. In so alleging, Boise Cascade successfully stated a claim for a categorical taking by physical occupation under this Court's takings jurisprudence.

Even as it acknowledged that "Boise lost whatever right it had to 'exclude' the owls nesting on its land," the court below rejected Boise Cascade's physical takings claim. It did so for essentially three reasons. First, the rule that physical occupations are categorical, compensable takings "applies only to permanent physical occupations either by *the government* or by a third party *acting under government authority*" *Id.* at 1353 (emphasis added). Second, Boise did not suffer a compensable physical taking because the government "did not cause or induce the spotted owls to breed on [Boise's] property"; rather, the government "simply regulated [Boise's] use of the property based on the presence of the spotted owls there." *Id.* at 1354 (quoting *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 991 P.2d 563, 570 (Or. Ct. App. 1999) (hereafter *Board of Forestry*), *cert. denied*, 532 U.S. 923 (2001). Third, there was no physical taking because the government "has no control over where the spotted owls nest, and it did not force the owls to occupy Boise's land." *Id.* at 1354-55.

As set forth below, this reasoning is flawed: the decisions of this Court demonstrate that the lower court erred in holding that a taking cannot occur unless the third-party occupier was "acting under government authority," unless the government "caused or induced" occupation, and unless it had "control" over the occupier or otherwise "forced" the occupation. More to the point perhaps, the decision below is in conflict with the decisions of many other lower courts.

B. The Conflict with This Court

In *Kaiser Aetna*, the property owners converted a privately owned lagoon into a marina, thereby connecting the lagoon to a publicly owned bay; subsequently, the United States sought

"an injunction to require [the owners] to allow public access" to the waters of the marina on the ground that it had become subject to the federal "navigational servitude." 444 U.S. at 169. Having ruled that "Congress could assure the public a free right of access to the [waters of the marina] if it so chose," *id.* at 174, this Court went on to consider whether Congress could do so "without invoking its eminent domain power and paying just compensation," *id.* at 180. The Court emphatically ruled that Congress could ***not***, because "the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina." *Id.* (emphasis added). But just who would actually be doing the "invading"? Not the government, of course, but members of the boating "public" based on their own independent choices. To use the Federal Circuit's terms, the public was not "acting under government authority" (any more than any person acts under government authority when he enters a public place), nor did the government "cause or induce" (let alone "force") anyone to sail into the marina; to the contrary, the government "ha[d] no control over where" public boaters chose to navigate their boats. 296 F.3d at 1353-55. In other words, it was no preclusion to this Court's finding a physical taking in *Kaiser Aetna* that members of the boating public were not placed or induced onto or into the waters of the private marina by the government.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), is similar in essential regards. In that case, "New York law provide[d] that a landlord must permit a cable television company to install its cable facilities upon his property." *Id.* at 421. This Court concluded that "such a physical occupation of property is a taking." *Id.* Yet again, it was not the *government* (or its agents) that occupied the landlord's property; rather, the occupier was a privately owned cable television company acting on its own behest. Indeed, the Court characterized the case as one in which the government's regulations "require[d] the landlord to suffer the physical occupation of a portion of his building *by a third party*." *Id.* at 440 (emphasis

added); *accord Florida Power Corp.*, 480 U.S. at 252 (quoting same); *Tahoe-Sierra*, 122 S. Ct. at 1479 n.18 (quoting same). As relevant to the present case, it is crucial to recognize that the New York City government did not "cause or induce" (never mind "force") the cable company to occupy the property of the landlord. No, the government merely "permit[ted]" the occupation, *Loretto*, 458 U.S. at 421, and then it "simply regulated [the landlord's] use of the property based on the presence of the [cable facilities] there," 296 F.3d at 1354 (quoting *Board of Forestry*, 991 P.2d at 570)—that is, prohibiting the landlord from taking any action that would interfere with or otherwise disturb those facilities.

Finally, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), this Court held that had the government "required the [property owners] to make an easement across their beachfront available to the public on a permanent basis . . . , we have no doubt there would have been a taking." The Court reached this conclusion *even though* that property would have been periodically occupied not by the government, but by random members of the beachgoing public:

> In *Loretto* we observed that where governmental action results in "a permanent physical occupation" of the property, by the government itself *or by others*, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

Id. at 831-32 (emphasis added and citations omitted) (quoting *Loretto*, 458 U.S. at 432-35). *Nollan* therefore confirms that physical occupations may be effected "by the government itself *or by others*." As in *Kaiser Aetna*, the occupiers could not be said to be "under government authority" any more than anyone so acts when he independently visits a place he is authorized to be. Furthermore, having merely required that a lateral ease-

ment be made "available" to the public, the government in no way caused or induced (or "forced") the public to traverse the property owners' beachfront, nor did it exert any "control" over when and where those traversals occurred. Thus, *Nollan* also confirms that the concepts of authority, causation, inducement, control, and force on which the Federal Circuit based its decision are in fact not prerequisites to government's liability for categorical takings by physical occupation.[3]

In focusing on those concepts, the Federal Circuit missed the common thread in this Court's physical takings jurisprudence, namely, the concept of required acquiescence or (to say the same thing) the loss of the right to exclude. When government regulation imposes that loss by making formerly private property "available" for use by third parties, it effects a taking by physical occupation. Having acknowledged that, as a result of government action, petitioner "lost whatever right it had to 'exclude' the owls nesting on its land, 296 F.3d at 1354, the court should have found a physical taking. Its failure to do so put it conflict with this Court.

C. The Conflict with Other Lower Courts

In the past decade, a variety of statutory and regulatory schemes have required the lower courts to apply this Court's physical takings jurisprudence. Several of the resulting decisions are in conflict with the decision below.

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[3] *Nollan* also demolishes the Federal Circuit's apparent holding that only "permanent and exclusive" (as opposed to intermittent or non-exclusive) occupations qualify as categorical takings: "We think a 'permanent physical occupation' has occurred, for purposes of [such term], where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." 483 U.S. at 832. There is no suggestion in *Nollan*, moreover, that the Nollans themselves were excluded from the beach, that they were "absolutely dispossess[ed]" by the relevant regulation. 296 F.3d at 1353.

We turn first to the "mandatory access provision" of the federal Pole Attachment Act. Under that provision, a public utility company "shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it" for the purpose of installing and carrying television or telephone wires. 47 U.S.C. § 224(f)(1). Under implementing regulations issued by the Federal Communications Commission, a cable or telephone company's access to, and use of, a utility's property to install and carry wires is triggered by a *request* from that company.[4] Accordingly, any use of that property by third parties depends on the independent choices of those parties. In other words, just as in *Nollan*, the statute in no way *causes or induces* (let alone *forces*) cable or telephone companies to use the utility's property; rather, the statute "requires that poles, ducts, conduits and rights-of-way controlled by utilities [be] *made available*" to requesting companies.[5]

Notwithstanding the lack of causation or inducement or force on the part of the government, and notwithstanding that cable and telephone companies are not under the government's control, the Eleventh Circuit had little trouble concluding that

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[4] *See* 47 C.F.R. § 1.1403(b) ("*Requests for access* to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing." (emphasis added)); 61 Fed. Reg. 45,476, 45,588 (1996) (observing that the statute "reflects Congress' determination that utilities generally must accommodate *requests for access* by telecommunications carriers and cable operators" (emphasis added)); *id.* at 45,593 ("Section 224(f)(1) mandates that a utility grant access to a *requesting* telecommunications provider or cable system operator . . . ." (emphasis added)).

[5] H.R. Conf. Rep. No. 104-458, *reprinted in* 142 Cong. Rec. H1078, H1133 (Jan. 31, 1996) (emphasis added) (discussing "Section 204 of the Senate bill"); *cf. id.* at H1134 (observing that as to Section 204, "[t]he conference agreement adopts the Senate provision with modifications").

"the Act's mandatory access provision effects a [physical] taking of a utility's property." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (citation omitted). The court readily recognized that, like Boise Cascade vis-à-vis the spotted owls, a utility "has no choice but to permit a cable [or telephone company] to permanently occupy physical space" on or in its property. *Id.* In contrast to the Federal Circuit, the Eleventh Circuit correctly perceived that "[s]uch a permanent, physical occupation of property falls squarely within the *Loretto* rule." *Id.* at 1329.

The conflict is even more explicit, however. Recall that the court below ruled that requiring property owners to acquiesce in the presence of spotted owls did not effect a physical occupation because the government "*simply regulated* [Boise's] use of the property based on the presence of the spotted owls there." 296 F.3d at 1354 (emphasis added) (quoting *Board of Forestry*, 991 P.2d at 570). The Eleventh Circuit confronted a similar argument in *Gulf Power*—"the mandatory access provision [is] a *simple regulatory* condition"—and quickly rejected the same as "meritless." 187 F.3d at 1330 (emphasis added). "Characterizing the mandatory access provision as a regulatory condition," concluded the court, "cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Id.* at 1331.

More generally, the "power to regulate [property] does not extend to taking without just compensation the right of a [property owner] to exclude unwanted occupiers of its property." *Id.* As the Eleventh Circuit observed, among other arguments this Court rejected in *Loretto* "was the argument that the statute was merely a 'permissible regulation of the use of real property.' . . . [A]lthough property is subject to broad regulatory power, a regulation becomes a taking when the government authorizes permanent physical occupation by a third party." *Id.* at 1328 (citation omitted) (quoting *Loretto*, 458 U.S. at 439).

We turn next to another "access" scheme, this one called "physical co-location," under which local telephone exchange companies (LECs) are required "to set aside a portion of their central offices for occupation and use by competitive access providers" (CAPs). *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1443 (D.C. Cir. 1994). "In physical co-location," according to the D.C. Circuit, "the CAP strings its cable to the LEC central office"; the LEC "must then turn over space within the central office in which the CAP may install and operate its circuit terminating equipment." *Id.* at 1444. The *Bell Atlantic* litigation involved a challenge to an FCC order that generally "require[d] LECs to permit CAPs to connect their facilities to the LEC network through" physical co-location. *Id.* In sustaining this challenge, the D.C. Circuit concluded that the order "directly implicates the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.'" *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426). Why is that so? Because the order would result in "an identifiable class of cases in which application of [the order] will necessarily constitute a taking." *Id.* (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)).[6]

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[6] *Accord GTE Service Corp. v. FCC*, 205 F.3d 416, 421 (D.C. Cir. 2000) (vacating a subsequent FCC co-location order in part because it "may result in unnecessary [physical] takings of LEC property"); *GTE Southwest Inc. v. Public Utility Commission*, 10 S.W.3d 7, 11 (Tex. App. 1999) (ruling that "the Commission's order amounts to a physical or per se taking of GTE's cables and facilities by requiring that GTE surrender its right to exclude others from physical use of its properties"); *id.* at 13 (explicitly "disagree[ing]" with the contention that "the Commission's order amounts not to a taking in the *Loretto* sense, but only to permissible regulation"); *GTE Northwest Inc. v. Public Utility Commission*, 900 P.2d 495 (Or. 1995) (invalidating state-law physical co-location scheme as a physical taking), *cert. denied*, 517 U.S. 1155 (1996).

Like the Eleventh Circuit's decision in *Gulf Power*, the D.C. Circuit's decision in *Bell Atlantic* cannot be squared with the ruling below. Although the challenged FCC order was said to "require" physical co-location, *Bell Atlantic*, 24 F.3d at 1443, that was merely shorthand for saying that physical co-location was required *if, and only if, it was requested by the CAP*. *See id.* at 1444 (framing issue as whether "the Commission lacks authority . . . to require LECs to permit physical co-location of equipment *upon demand*" (emphasis added)). In other words, perhaps to labor the point, the order found to effect a physical taking in *Bell Atlantic* surely did not *cause or induce* (or *force*) the CAP to occupy LEC property, and the order did not put the government in control of which property would be occupied. Accordingly, the decisions of the Eleventh and D.C. Circuits have no regard for the concepts of authority, causation, inducement, control, and force on which the Federal Circuit rested its decision. The result is a straightforward conflict among lower courts in the interpretation of federal takings law.[7]

In all of these cases it could reasonably be asserted, as the court asserted below, that the government "simply regulated [owners'] use of the property based on the presence of" the occupying instrumentalities. 296 F.3d at 1354 (quoting *Board of*

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[7] In the reported decisions discussed herein, the range of things that can effect takings by physical occupation runs from humans (*Kaiser Aetna* and *Nollan*) all the way to inanimate objects (*Loretto*, *Gulf Power*, and *Bell Atlantic*). Moreover, one can easily imagine takings by physical occupation where domestic animals are involved; e.g., the government requires *A* to open his pastureland to grazing by *B*'s cattle. Given this spectrum, there is no reason why "wild" animals such as spotted owls should be categorically excluded from physical occupation analysis. Certainly, it cannot be because the government does not "control" wild animals, as the Federal Circuit concluded. *See* 296 F.3d at 1354. As this Court's decisions demonstrate, what counts is not control by the government but "required acquiescence" on the part of the property owner. *Yee*, 503 U.S. at 527.

Forestry, 991 P.2d at 570). That is, whenever the boaters, cable equipment, telephone equipment, or beachgoers were "present" on the property, the owners were restricted in their "use" of it. But the restrictions were of a particular kind: the owners could not use their property in ways that would interfere with the occupiers' government-sanctioned use. That is precisely the kind of "regulation" Boise Cascade endured based on the presence of spotted owls—restrictions on using their forestland in ways that would interfere with owls' present and future use of that same land as habitat. That is, Boise's use of its property was not regulated in the abstract; it was regulated for the purpose of—and with the actual effect of—requiring Boise to acquiesce in the owls' presence and, concomitantly, preventing it from excluding the owls. The *whole point* of the ESA regulations imposed by the government and enforced at its behest by the Oregon district court was to ensure that Boise's property "will be *used* again . . . for nesting by either the Walker Creek male or another owl pair." Petition Appendix 30a (emphasis added) (government's ESA counterclaim against Boise).

If the government could be liable for a taking by physical occupation in *Kaiser Aetna*, *Loretto*, or *Nollan* without having caused or induced or forced the third-party occupations, and without having exercised control over the occupiers, the government can be (and is) liable for such a taking in the present case. If "simply regulating" private property based on the presence of government-sanctioned third-party occupiers could effect a physical taking in *Kaiser Aetna*, *Loretto*, or *Nollan*, it can (and did) effect such a taking here.

In so arguing, we do not mean to suggest that a physical taking occurs merely by enactment of a statute or a regulation or by other government action that *theoretically* extinguishes a property owner's right to exclude. In a trivial sense, every owner in the country "lost" the right to exclude spotted owls when that species was listed under the ESA. But for purposes of the Takings Clause, we think the crucial point is when that

loss becomes more than theoretical, i.e., when it begins to have real-world effects. Thus, petitioner did not suffer a physical taking when the ESA was enacted, when the habitat modification regulation (50 C.F.R. § 17.3) was promulgated, or even (it would seem) when the spotted owl was listed. While one can imagine varying scenarios, in the present case it is reasonably clear that Boise Cascade lost its right to exclude in a practical sense when the Oregon district court entered "a preliminary injunction preventing logging pending the results of the [Forest] Service's 1998 breeding season surveys." 296 F.3d at 1342.

The limitations on what might be called occupations-by-regulation are apparent in the cases discussed above. Thus, in *Kaiser Aetna*, an actual taking would have occurred only if and when the government obtained the requested "injunction to require [the owners] to allow public access" to the waters of the marina on the ground that it had become subject to the federal "navigational servitude," 444 U.S. at 169, notwithstanding that purported basis for such an injunction, 33 U.S.C. § 403, was enacted in 1899. Until an injunction was entered, the servitude (and the public's use of it) would be wholly theoretical. *See also Nollan*, 483 U.S. at 831 (no physical taking would have occurred until the government actually "required the Nollans to make an easement across their beachfront available to the public on a permanent basis").

Hendler v. United States, 11 Cl. Ct. 91, 93 (1986), *rev'd*, 952 F.2d 1364 (Fed Cir. 1991), provides yet another example. A federal statute gave the government authority to undertake "investigations, monitoring, surveys, testing, and other information gathering" on private property, 42 U.S.C. § 9604(b)(1), and the government had issued an order granting itself access to certain property for the purpose of "locating[,] constructing, operating, maintaining, and repairing [groundwater] wells," 11 Cl. Ct. at 93. Nevertheless, it was not the statute, or even the property-specific administrative order, that effected a physical taking in *Hendler*; rather, it was "the Government's *actions*, in

placing wells on plaintiffs' property and engaging in other activities on the site" that resulted in a physical taking. 952 F.2d at 1375 (emphasis added); *see also Hendler v. United States*, 175 F.3d 1374, 1383 (Fed. Cir. 1999) (rejecting the theory that "the scope of the taking . . . is defined by the broad scope of the access order, and not by the actual activities undertaken by the Government"). By the way, *Hendler* also demonstrates that the finding of a physical taking need not result in serious financial consequences to the government. Even though the taking continued for more than a decade, the Federal Circuit affirmed a judgment that the property owner was due no compensation at all, given that the benefits of the government's activities were found to have outweighed the harms. *See id.* at 1378.

CONCLUSION

In rejecting petitioner's physical takings claim, the Court of Appeals for the Federal Circuit departed from this Court's takings jurisprudence, thereby exacerbating a conflict among the lower courts. The Court should grant the petition for certiorari to resolve that conflict.

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Respectfully submitted,

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